

1-1-1996

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Recommended Citation

Madeleine Randal, Comment, *Holy War: In the Name of Religious Freedom, California Exempts Churches From Historic Preservation*, 37 SANTA CLARA L. REV. 213 (1996).

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HOLY WAR: IN THE NAME OF RELIGIOUS FREEDOM, CALIFORNIA EXEMPTS CHURCHES FROM HISTORIC PRESERVATION

I. INTRODUCTION

In California the power to designate historic landmarks, with or without the property owner's permission, has rested with cities and counties for decades.¹ In 1994, against a backdrop of widely divergent court decisions² and growing controversy,³ historic preservation in California changed dramatically. At the urging of the Catholic Diocese of San Francisco,⁴ the State Legislature passed Assembly Bill 133, which gave religious organizations absolute control over whether

1. The power to designate historic landmarks was given to cities in 1957 under California Government Code § 37361, subdivision (b), which reads, in part, that legislatures may "provide for places, buildings, structures, works of art, and other objects, having a special character or special historical or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use" CAL. GOV'T CODE § 37361 (Deering Supp. 1995). In nearly identical language, the power to designate historic landmarks was given to counties in 1963 under California Government Code § 25373, subdivision (b), which reads, in part, that county boards of supervisors are authorized to "provide special conditions or regulations for the protection, enhancement, perpetuation, or use of places, sites, buildings, structures, works of art and other objects having a special character or special historical or aesthetic interest or value" CAL. GOV'T CODE § 25373 (Deering 1995).

2. *Compare* Rector, Wardens, and Members of the Vestry of Saint Bartholomew's Church v. City of New York, 914 F.2d 348 (2d. Cir. 1990) (finding that a historic preservation ordinance did not burden church's free exercise), *cert. denied*, 499 U.S. 905 (1991) [hereinafter *Saint Bartholomew's*] with City of Seattle v. First Covenant Church of Seattle, 787 P.2d 1352 (Wash. 1990) ("First Covenant I"), *vacated and remanded*, 499 U.S. 901 (1991), *aff'd on reh'g*, 840 P.2d 174 (Wash. 1992) (finding that historic preservation did burden church's free exercise) ("First Covenant II").

3. *See, e.g.*, First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Preservation Bd., 887 P.2d 473 (Wash. Ct. App. 1995) (part of the continuing battle over whether churches in Seattle can be designated landmarks), *modified*, No. 33408-5-I, 1995 Wash. App. LEXIS 88, at *1 (Wash. Ct. App. Mar. 7, 1995).

4. Gerald D. Adams, *Suit Challenges Ban of Church Preservation*, S.F. EXAMINER, May 11, 1995, at A4 ("[Assembly Speaker] Brown wrote the legislation at the request of the archdiocese and the San Francisco Interfaith Council.").

their property could be historically designated.⁵ No other property owners have this power.⁶

In response to the passage of AB 133, a non-profit development corporation, preservationists, and the City and County of San Francisco⁷ filed suit against the State of California, claiming that AB 133 is unconstitutional and should be overturned.⁸ The suit argued, in part, that the law "improperly elevates the status of [religious] organizations above secular property owners" and that the power granted "is beyond the scope of" any permissible protection of religious beliefs,⁹ thereby violating the Establishment Clause¹⁰ of both

5. Assembly Bill 133 ("AB 133") is codified as 1994 Cal. Stat. ch 1199 § 1. Subdivision (d) of California Government Code § 25373 and subdivision (c) of California Government Code § 37361 were amended to read, in part:

Subdivision (b) shall not apply to noncommercial property owned by any association or corporation that is religiously affiliated and not organized for private profit, whether the corporation is organized as a religious corporation, or as a public benefit corporation, provided that both of the following occur:

- (1) The association or corporation objects to the application of the subdivision to its property.
- (2) The association or corporation determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved.

CAL. GOV'T CODE §§ 25373, 37361 (Deering Supp. 1995).

Subdivision (e) of §§ 25373 and 37361 was amended to read, in part: Nothing in this subdivision shall be construed to infringe on the authority of any legislative body to enforce special conditions and regulations on any property designated prior to January 1, 1994, or to authorize any legislative body to override the determination made pursuant to paragraph (2) of subdivision 84(d).

Id.

6. See *supra* note 5.

7. Plaintiffs' Joint Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Ca. Super. Ct. Apr. 5, 1996) (stating additional plaintiffs as: Foundation for San Francisco's Architectural Heritage, The Los Angeles Conservancy, California Preservation Foundation, California Planning and Conservation League, California Chapter American Planning Association, National Alliance of Preservation Commissions, National Trust for Historic Preservation, and The City and County of San Francisco). Summary judgment was granted to the plaintiffs without comment on April 5, 1996; the State is appealing that decision. *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560, slip op. (Cal. Super. Ct. Apr. 5, 1996), *appeal docketed*, No. CO24192 (3rd Cal. Ct. App. July 8, 1996).

8. *Id.* at 1-2.

9. *Id.* at 8.

the state¹¹ and federal¹² constitutions. Summary judgment granted to the plaintiffs without comment is being appealed by the State.¹³ Meanwhile, the issue of whether the historic preservation of churches is constitutional, or whether AB 133 is constitutional, remains unanswered. In fact, the controversy continues in at least two California cities: Los Angeles¹⁴ and Berkeley.¹⁵

This comment first examines the background of the controversy over the historic preservation of churches, including the development of historic preservation¹⁶ and its legal basis.¹⁷ The process of historic designation and its impact on religious organizations, central to the controversy, is detailed.¹⁸ Recent case law and legislative efforts to alter the historic preservation of churches, both of which contribute to the current confusion surrounding the historic preservation

10. "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I. "Free exercise and enjoyment of religion without discrimination or preference are guaranteed The Legislature shall make no law respecting an establishment of religion." CAL. CONST. art. I, § 4.

11. Plaintiffs' Joint Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 21-22, *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Ca. Super. Ct. Apr. 5, 1996).

12. *Id.* at 11-21.

13. *See supra* note 7.

14. The Roman Catholic archdiocese of Los Angeles is pushing to replace an earthquake damaged, 120-year-old church with a "massive new cathedral complex." Pamela Kramer, *L.A. Crusade: A City Poor in Monuments Sees Church-State Struggle over Crumbling Cathedral*, S.J. MERCURY NEWS, June 26, 1996, at A1, A6. The Los Angeles Conservancy, a group of historic preservationists, has won an injunction temporarily halting the church's demolition. *Id.* Comments on the controversy by those described as "First Amendment expert[s]" reflect the current uncertainty in this area of law. *Id.* A law school dean, Ed Gaffney, said: "This is at the very heart of the First Amendment I'm frankly amazed the government thinks they can control the worship by a religious community." *Id.* Another lawyer disagreed: "This isn't a religious-practice issue This is an edifice issue." *Id.*

15. A Berkeley church wants to tear down a 90-year-old historically designated apartment building to make room for expanded administrative offices and social service programs. Will Harper, *Church Sues City Over Landmarking*, THE BERKELEY VOICE, June 27, 1996, at 1. Because the building is historic, the city is requiring that the church pay for an expensive environmental impact report before the building may be demolished. *Id.* The congregation has filed a suit challenging the building's landmark designation, with its attorney arguing that "[t]he city's aesthetic interests can't override the First Amendment right to freedom of religion." *Id.*

16. *See discussion infra* Part II.A.

17. *See discussion infra* Part II.B.

18. *See discussion infra* Parts II.C-D.

of religious property, are outlined.¹⁹ After exploring the history and provisions of AB 133, the constitutional issues raised by its passage are examined.²⁰

The specific problem addressed by this comment is whether AB 133 and other blanket exemptions of churches from historic preservation are constitutional,²¹ a question that remains unanswered even now that summary judgment has been granted to the plaintiffs in *East Bay Asian Local Dev. Corp. v. California*.²² Necessarily, the analysis includes consideration of whether the historic preservation of church-owned property is itself constitutional, an issue of ongoing controversy.²³ An analysis of related case law and the conclusion that AB 133 likely violates the Establishment Clauses of the federal and state constitutions,²⁴ is followed by proposed guidelines for alternative legislation.²⁵ This proposal for legislation balances free exercise burdens with Establishment Clause concerns and would create a more uniform scheme for the historic preservation of California churches.²⁶

II. BACKGROUND

A. A Brief History of Historic Preservation

At first glance, historic preservation seems innocuous enough—local government designates buildings and districts of historical, architectural, or cultural significance for special treatment in order to preserve the area's historical and cultural foundations.²⁷ For decades, historic preservation has enjoyed widespread support at all levels of government²⁸ and

19. See discussion *infra* Parts II.E-F.

20. See discussion *infra* Parts II.G-H.

21. See discussion *infra* Part III.

22. See *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Cal. Super. Ct. Apr. 5, 1996) (granting summary judgment to plaintiffs).

23. See *supra* notes 15-16.

24. See discussion *infra* Part IV.

25. See discussion *infra* Part V.

26. See discussion *infra* Part V.

27. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978) (finding that "preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal").

28. See National Historic Preservation Act, Pub. L. 89-665, Oct. 15, 1966, 80 Stat. 915 (current version at 16 U.S.C. § 470 (Supp. 1988)); Alan C. Weinstein, *The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 TEMP. L.REV. 91, 98-99 (1992) (discussing the history of historic preservation legislation).

in the courts.²⁹ By the time Congress passed the National Historic Preservation Act in 1966,³⁰ every state had enacted legislation authorizing historic preservation.³¹ Today, nearly two thousand municipalities across the country have local ordinances designed to protect, designate, and regulate historic districts and individual landmarks.³² In addition, the United States Supreme Court has clearly recognized that historic preservation advances a legitimate state interest.³³

B. *The Legal Basis for Historic Preservation*

Historic preservation is a form of land use regulation³⁴ authorized by the state³⁵ and largely controlled at the local government level.³⁶ The United States Supreme Court has found that the power of municipalities to designate historic landmarks is based in their police power over affairs of safety, health, and welfare.³⁷ California's Supreme Court has also recognized the police power of local government to regulate physical and aesthetic values.³⁸ The power to designate landmarks in California has been statutorily vested with cities since 1957 and with counties since 1963.³⁹

C. *The Process and Impact of Landmark Designation*

Local preservation ordinances are usually administered by a board or commission, whose members are often appointed by the mayor.⁴⁰ To be eligible for landmark status, a

29. *Penn*, 438 U.S. at 104.

30. 16 U.S.C. § 470 (Supp. 1988).

31. Weinstein, *supra* note 28, at 98.

32. *Id.*

33. *Penn*, 438 U.S. at 129.

34. Angela C. Carmella, *Landmark Preservation of Church Property*, 34 CATH. LAW. 41, 42 (1991).

35. See, e.g., CAL. GOV'T CODE §§ 25373, 37361, *supra* note 1.

36. Carmella, *supra* note 34, at 42 (noting that "for the most part . . . preservation is . . . administered at the municipal level").

37. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (describing the scope of police power over municipal affairs as being "broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary.").

38. *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 861 (1980) (acknowledging authority of cities to regulate physical and aesthetic values under their police powers), *rev'd on other grounds*, 453 U.S. 490 (1981), *cert. denied*, 453 U.S. 922 (1981).

39. CAL. GOV'T CODE §§ 25373, 37361, *supra* note 1.

40. Weinstein, *supra* note 28, at 100.

property must have architectural, historic, or cultural value.⁴¹ Some local ordinances require that buildings meet a minimum age requirement;⁴² others waive the age requirement as long as the property is of exceptional importance.⁴³ Depending on the local ordinance, a variety of people may be allowed to recommend a building for designation: the property's owner, preservation organizations, or simply an interested person.⁴⁴

After a request for designation is made, the building is evaluated by experts to determine whether it meets the requirements of the ordinance for designation.⁴⁵ A public, governmental hearing is held on the proposed landmark,⁴⁶ and the designation decision is made either by the commission or by the city council on the recommendation of the commission.⁴⁷ Generally, a property owner need not agree to the designation,⁴⁸ although some ordinances include hardship exemptions or other procedural protections if the owner objects.⁴⁹

When a property is designated a landmark, usually only the exterior of the building is included,⁵⁰ and the maintenance or restoration burden on the owner may be minimal⁵¹ or great.⁵² Often the property's owner is prohibited from demolishing, altering, or renovating the property without prior approval of the local preservation commission.⁵³ If the commission declines to approve changes proposed by the owner, most local ordinances allow for an appeal, either to a city council or municipal court.⁵⁴

41. Carmella, *supra* note 34, at 43.

42. *Id.* (noting that in some municipalities, "a building must . . . be at least twenty-five, fifty, or . . . seventy-five years old to be eligible for landmark status").

43. Weinstein, *supra* note 28, at 101.

44. Carmella, *supra* note 34, at 44.

45. *Id.* at 44-45.

46. *Id.* at 45.

47. *Id.*

48. *Id.*

49. Carmella, *supra* note 34, at 45.

50. Weinstein, *supra* note 28, at 102.

51. *Id.*

52. Carmella, *supra* note 34, at 51 (noting that landmark preservation normally "requires maintenance . . . above and beyond what is required under safety-based regulations").

53. Weinstein, *supra* note 28, at 102-03.

54. *Id.* at 104.

D. *The Tension Between Churches and Historic Preservation*

Because churches⁵⁵ are often architecturally, historically, or culturally significant,⁵⁶ they are prime candidates for historic preservation.⁵⁷ But churches have fiercely fought landmark designation at times, citing violations of the First Amendment's Free Exercise⁵⁸ and Establishment Clauses⁵⁹ and the Fifth Amendment's ban on takings.⁶⁰ In recent years the battle has heated up,⁶¹ and the law surrounding the historic preservation of churches has become extremely unsettled.⁶² With little direction from the United States Supreme Court, which has never ruled specifically on the historic designation of church property,⁶³ state supreme courts⁶⁴ and a variety of state⁶⁵ and local⁶⁶ legislative acts have attempted to address the controversy.

55. In this comment, the use of "church" to describe a structure denotes church, temple, mosque, or other building used for religious ceremonies or worship.

56. Carmella, *supra* note 34, at 44.

57. Weinstein, *supra* note 28, at 110.

58. *Saint Bartholomew's*, *supra* note 2, at 353 (arguing that New York City's landmarks law "substantially burdens religion in violation of the First Amendment").

59. *Id.* at 352 (arguing that the landmarks law violates the Establishment Clause by "entangling the government in religious affairs").

60. *Id.*

61. Three of the many cases challenging the historic preservation of churches in the 1990's are: *Saint Bartholomew's*, *supra* note 2; First Covenant I, 787 P.2d 1352 (Wash. 1990), *vacated and remanded*, 499 U.S. 901 (1991), *aff'd on reh'g*, First Covenant II, 840 P.2d 174 (Wash. 1992); First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Preservation Bd., 887 P.2d 473 (Wash. Ct. App. 1995), *modified*, No. 33408-5-I, 1995 Wash. App. LEXIS 88, at *1 (Wash. Ct. App. Mar. 7, 1995).

62. In combination, three cases reflect the unsettled state of the law in this area. In *Saint Bartholomew's*, a federal court found that historic designation of a church did not violate the Federal Constitution. *Saint Bartholomew's*, *supra* note 2, at 353. However, in *First Covenant*, a state supreme court found that landmark designation of a church violated the federal and state constitutions. First Covenant II, 840 P.2d 174, 174 (Wash. 1992). Yet, in *First United Methodist*, the constitutionality of the historic preservation of churches is still being argued, despite the decision in *First Covenant*. *First United Methodist Church of Seattle*, 887 P.2d at 473.

63. Weinstein, *supra* note 28, at 121.

64. First Covenant I, 787 P.2d 1352 (Wash. 1990), *vacated and remanded*, 499 U.S. 901 (1991), *aff'd on reh'g*, First Covenant II, 840 P.2d 174 (Wash. 1992).

65. Carmella, *supra* note 34, at 55 (noting efforts to gain religious exemption in Pennsylvania and New York).

Although some churches and clergy support historic preservation,⁶⁷ others deeply oppose it.⁶⁸ Church members sometimes use landmark designation in attempts to keep churches open,⁶⁹ questioning the judgment of church elders in how best to use financial resources.⁷⁰ Churches often see landmark designation as a financial burden, which has diverted money from more important programs⁷¹ and shifted the church's focus from its congregation to its architecture.⁷² Churches also argue that landmark designation prevents them from responding to changes in their congregations or missions.⁷³ Some religious organizations view any government regulation as intruding on church autonomy.⁷⁴ Others view preservation as impermissibly involving government in church affairs ranging from the design of areas of worship⁷⁵ to requiring that churches provide detailed information, including finances, religious doctrine, and mission, when applying for hardship exemptions.⁷⁶

66. *Id.* (noting Chicago's exemption of churches from historic preservation); Weinstein, *supra* note 28, at 114-15.

67. Weinstein, *supra* note 28, at 94 (noting that some church leaders, recognizing the theological importance of maintaining a linkage with the past, support historic preservation).

68. See, e.g., David W. Dunlap, *Battle of St. Bart's Goes to Landmarks Panel*, N.Y. TIMES, Feb. 1, 1984, at B1 (statement of the Bishop of New York, Paul Moore, Jr.) (The "Christian church must be free to carry out the commands laid upon us by Jesus Christ . . . St. Bartholomew's seeks to carry out its ministry . . . and cannot do so unless a secure new source of revenue can be found.").

69. See, e.g., Michael Hirsley, *Pucinski Goes to Bat for Shuttered Church*, CHI. TRIB., Sept. 26, 1990, Chicagoland at 2 (discussing parishioners who, in an effort to keep their church open, joined in a lawsuit to keep Chicago from giving a blanket exemption to the historic preservation of churches); Jodi Wilgoren, *Council Acts to Take Church off Historic Roll*, L.A. TIMES, June 19, 1996, at B3 (describing an emotional city council hearing at which a parishioner wept as she spoke, "This church binds us together We need to keep our memories. We need to keep unity.").

70. See, e.g., Anne Keegan, *Chicago Razing its Past along with Churches*, CHIC. TRIB., Feb. 22, 1988, at 1 (quoting a parishioner: "I don't think it's fair If our priests can run around and raise money to build a church in Nicaragua, why can't they help save one in Chicago?").

71. Dunlap, *supra* note 68, at B1 (quoting Bishop Moore: "We are weighing aesthetics against the housing, feeding and caring of the poor, elderly and homeless.").

72. Carmella, *supra* note 34, at 48.

73. *Id.* at 47-48.

74. Weinstein, *supra* note 28, at 110.

75. Carmella, *supra* note 34, at 52.

76. *Id.*

E. *Dissonance in the Courts: Historic Preservation and Free Exercise*

At the time AB 133 was passed, the tension between churches and historic preservation had escalated into the courts.⁷⁷ Complicating matters was the controversial United States Supreme Court holding in *Employment Division, Department of Human Resources v. Smith*,⁷⁸ which established a new test for free exercise challenges,⁷⁹ replacing that of *Sherbert v. Verner*.⁸⁰ In the post-*Smith* environment, courts did not agree on a standard under which free exercise and the historic preservation of churches could be judged.⁸¹ This dissonance can clearly be seen in the following detailed summaries of *Saint Bartholomew's v. New York City*⁸² and *First Covenant Church v. Seattle*,⁸³ neither decided by the United States Supreme Court. These two cases provide insight into the myriad issues surrounding the historic preservation of churches and the ways in which legislation could address some of these issues.

1. *Saint Bartholomew's: A Federal Court Applies the Free Exercise Test of Smith*

Saint Bartholomew's is an Episcopal Church in New York City.⁸⁴ Built in 1919, the church building sits on very valuable land⁸⁵ and has been described as having "one of the

77. See, e.g., *Saint Bartholomew's*, *supra* note 2, at 348; *First Covenant II*, 840 P.2d 174, 174 (Wash. 1992).

78. 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (1991).

79. According to *Smith*, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability, on the ground that the law proscribes . . . conduct that this religion prescribes." *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)) (Stevens, J., concurring). This standard was the basis for the test used in *Saint Bartholomew's*.

80. 374 U.S. 398 (1963). According to *Sherbert v. Verner*, burdens on free exercise are allowed only if justified by a compelling state interest. *Id.* at 406. Some state courts, such as the *First Covenant* court, continue to apply the test of *Sherbert v. Verner*. *First Covenant II*, 840 P.2d 174, 182 (Wash. 1992).

81. See, e.g., *Saint Bartholomew's*, *supra* note 2, at 348; *First Covenant II*, 840 P.2d 174, 203 (Wash. 1992). The federal court in *Saint Bartholomew's* used a standard based on *Smith*, and the state supreme court in *First Covenant* used the pre-*Smith*, *Sherbert* test. See *infra* notes 79-80.

82. *Saint Bartholomew's*, *supra* note 2, at 348.

83. *First Covenant II*, 840 P.2d 174 (Wash. 1992).

84. *Saint Bartholomew's*, *supra* note 2, at 351.

85. Margot Hornblower, *Church Against City: St. Bartholomew's Fight to Build a Skyscraper*, WASH. POST, Feb. 1, 1984, at C1.

most remarkable ecclesiastical designs produced in the United States."⁸⁶ The church also owns the seven-story Community House building next door, which was designed to complement the church and was built soon after.⁸⁷ The church building and Community House were designated landmarks, without objection by the clergy or congregation, in 1967.⁸⁸ In 1983, the church decided to demolish Community House and replace it with a fifty-nine story, mirrored tower to be built by a private developer.⁸⁹ The church was to receive millions of dollars a year for the lease of the land, which would fund maintenance of the church as well as community activities such as soup kitchens and homeless shelters.⁹⁰

Twice the church applied to the Landmarks Commission for permission to replace Community House—the second time reducing the proposed height of the tower to forty-seven stories⁹¹—and each time was denied.⁹² The church then filed for a hardship exception based on the financial needs of the church and the cost of maintenance and repairs to the church and Community House.⁹³ This application was also denied, and in 1986 the church filed suit, claiming in part that New York City's landmarks law violated the Free Exercise and Establishment Clauses by "excessively . . . entangling the government in religious affairs."⁹⁴

On the free exercise claim, the Second Circuit Court of Appeals acknowledged that landmark designation "drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs."⁹⁵ However, citing *Smith's* free exercise test—"[t]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes"⁹⁶—the court found the landmarks law to be

86. *Id.* (quoting Richard Longstreth, chairman of the Society of Architectural Historians' preservation committee).

87. *Saint Bartholomew's*, *supra* note 2, at 351.

88. *Id.*

89. Dunlap, *supra* note 68, at B1.

90. Hornblower, *supra* note 85, at C1.

91. *Saint Bartholomew's*, *supra* note 2, at 352.

92. *Id.* at 351-52.

93. *Id.* at 352.

94. *Id.*

95. *Id.* at 355.

96. *Saint Bartholomew's*, *supra* note 2, at 354.

constitutional.⁹⁷ The court found that New York City's landmark preservation ordinance⁹⁸ was neutral and generally applicable and that the adverse impact of landmark designation on the church's finances was simply an incidental effect of that law.⁹⁹ Without proof of "discriminatory motive, coercion in religious practice, or the Church's inability to carry out its religious mission in its existing facilities," as required by *Smith*, no First Amendment violation had occurred.¹⁰⁰

On the church's establishment claim—that the ordinance involved an excessive degree of entanglement between church and state—the court again found no constitutional violation.¹⁰¹ Citing the United States Supreme Court, the court found that the degree of interaction did not rise to the level of entanglement because the only matters scrutinized by government entities were architectural and financial.¹⁰²

2. *First Covenant: A State Supreme Court Rejects Smith*

On the same day that the United States Supreme Court denied certiorari on *Saint Bartholomew's*,¹⁰³ the Court vacated judgment in another case involving the historic preservation of churches, *First Covenant*,¹⁰⁴ and sent it back to the Washington Supreme Court for review in light of *Smith*.¹⁰⁵

First Covenant Church was historically designated under Seattle's Landmarks Preservation Ordinance in 1981, against the church's objections.¹⁰⁶ While First Covenant continued to object to its designation as a landmark, the local Landmarks Preservation Board adopted controls over its exterior.¹⁰⁷ In 1985, Seattle's city council adopted an ordinance¹⁰⁸ designating the church as a landmark and requiring

97. *Id.*

98. *Id.* at 355-56.

99. *Id.*

100. *Id.* at 355.

101. *Saint Bartholomew's*, *supra* note 2, at 356 n.4.

102. *Id.*

103. *Comm. to Oppose Sale v. City of New York*, 499 U.S. 905 (1991).

104. *City of Seattle v. First Covenant Church*, 499 U.S. 901 (1991).

105. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (1991).

106. *First Covenant II*, 840 P.2d 174, 177 (Wash. 1992).

107. *Id.* at 209.

108. *Id.*

First Covenant to get a certificate of approval before making certain alterations to the exterior of the church.¹⁰⁹ The ordinance contained an exemption for religious buildings; the exemption gave control of liturgically-related architectural changes to churches, however it still required review by the Landmarks Preservation Board.¹¹⁰

First Covenant filed suit, claiming that Seattle's Landmarks Preservation Ordinance was an unconstitutional violation of the First Amendment Free Exercise Clause and that the ordinance designating First Covenant a landmark was void.¹¹¹ The Washington Supreme Court, initially basing its free exercise analysis on pre-*Smith* decisions, found that historic preservation burdened free exercise and was not a compelling state interest. Consequently, the court originally held that the two ordinances violated state and federal constitutions.¹¹²

On remand and under direction by the United States Supreme Court to reconsider the case in light of the *Smith* decision,¹¹³ the Washington Supreme Court discussed *Smith* but declined to apply its test. The court felt that *First Covenant* fell within exceptions to the *Smith* rule and therefore required application of strict scrutiny.¹¹⁴ Although the court believed that it could simply distinguish *Smith* from *First Covenant* and base its decision solely on federal grounds, it chose to rest its decision on independent state grounds as well,¹¹⁵ thereby ensuring that the decision would not be reviewed by the United States Supreme Court.¹¹⁶ The court chose to base its decision, in part, in state law because it found *Smith* "uncertain"—departing as it does from long-established law and adopting a test that "places free exercise in a subordinate, instead of preferred, position."¹¹⁷

The Washington Supreme Court in *First Covenant* held, on remand, that Seattle's ordinances "impose unconstitutional administrative and financial burdens on First Cove-

109. *Id.*

110. *Id.*

111. *First Covenant II*, 840 P.2d 174, 177-78 (Wash. 1992).

112. *Id.* at 178.

113. *Id.*

114. *Id.* 178-83.

115. *Id.* at 184-87.

116. *First Covenant II*, 840 P.2d 174, 188 (Wash. 1992).

117. *Id.* at 187.

nant's free exercise of religion."¹¹⁸ In addition, the court found that landmark ordinances do not further a compelling state interest and thus do not provide a justification for their impermissible burdens.¹¹⁹ The court reinstated its original holding that the landmark ordinances violate the state and federal constitutional free exercise guarantees, adding that "*Smith* does not compel a different result."¹²⁰

3. *Ongoing Challenges to the Constitutionality of the Historic Preservation of Churches*

Also of note are three ongoing cases involving the First Amendment and the historic preservation of church buildings and other church-owned property. In *Flores v. Boerne*,¹²¹ a Texas church was denied a remodeling permit because its building was a candidate for historic preservation. The archdiocese sued, basing its case on the Religious Freedom Restoration Act.¹²² A district court judge declared the Act an unconstitutional congressional foray into judicial territory.¹²³ On appeal, the Fifth Circuit Court of Appeals declared the Act constitutional and has remanded the case for further consideration.¹²⁴

In a second ongoing case, *First United Methodist v. Seattle Landmarks Preservation Board*,¹²⁵ the Washington courts continue to address constitutional questions even after the state supreme court's decision in *First Covenant*.¹²⁶ The

118. *Id.* at 188.

119. *Id.*

120. *Id.*

121. 877 F. Supp. 355 (W.D. Tex. 1995).

122. *Id.* at 356; Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (Supp. 1996) ("RFRA"). RFRA was Congress' response to the Supreme Court's *Smith* decision. The Act requires that the state prove a compelling interest in order to restrict religious exercise. *Id.*

123. *Flores*, 877 F. Supp. at 357.

124. *Flores v. City of Boerne, Tex.*, 73 F.3d 1352 (5th Cir. 1996).

125. See *First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Preservation Bd.*, 887 P.2d 473 (Wash. Ct. App. 1995), modified, No. 33408-5-I, 1995 Wash. App. LEXIS 88, at *1 (Wash. Ct. App. Mar. 7, 1995).

126. *First Covenant I*, 787 P.2d 1352 (Wash. 1990), vacated and remanded, 499 U.S. 901 (1991), *aff'd on reh'g*, *First Covenant II*, 840 P.2d 174 (Wash. 1992).

third case is analyzed below—the recent challenge to the constitutionality of California's AB 133.¹²⁷

F. *Legislative Efforts to Address Historic Preservation of Church Property*

There have been several legislative efforts at both state and local levels to address the controversy over the historic preservation of church property.¹²⁸ State legislatures in New York¹²⁹ and Pennsylvania¹³⁰ have defeated bills much like AB 133, which would have prohibited the landmark designation of churches without owner consent.¹³¹

Several local governments have rewritten ordinances to exempt churches from preservation.¹³² In 1987, Chicago responded to a controversial attempt to historically designate a church by passing an ordinance that prohibits the designation of churches as landmarks without owner consent.¹³³ The ordinance also forbids the landmark designation of church interiors and provides a hardship exemption available to all non-profit property owners.¹³⁴ Although the constitutionality of the ordinance was challenged as violating the Establishment Clause by the National Trust for Historic Preservation in *Alger v. Chicago*, the court held that the plaintiffs lacked standing, and the suit was dismissed.¹³⁵

127. *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Cal. Super. Ct. Apr. 5, 1996).

128. Weinstein, *supra* note 28, at 113-14.

129. In its 1983-84 session, the New York Legislature considered a bill broader than AB 133. *Id.* Unlike AB 133, which requires church consent only prior to designation of *non-commercial* church property, the New York bill would have required owner consent prior to the designation of *any* church property. *Id.* Reflecting the division within the religious community over the preservation of church property, not all religious leaders supported the bill and it was defeated. *Id.*

130. The 1989 Pennsylvania bill was also slightly broader than AB 133, requiring owner consent for the designation of any property "owned and used by a . . . religious organization in furtherance of its religious purposes." *Id.* at 113-14 (quoting Pa. S.B. No. 1228 §§ 1-2 (1989)). AB 133 affects only *non-commercial* church property. *Id.* at 114. Again opposed by some church leaders, the bill was defeated. *Id.*

131. *Id.* at 113.

132. *Id.*

133. Weinstein, *supra* note 28, at 114.

134. *Id.*

135. *Alger v. City of Chicago*, 753 F. Supp. 228 (N.D. Ill. 1990).

In 1989, New York City adopted a plan supported by preservationists that created a Hardship Review Panel.¹³⁶ Although the panel's review guidelines give "significant protection"¹³⁷ to tax-exempt organizations in the landmark designation process, it has rarely overturned the Landmarks Commission's decisions.¹³⁸ The city chose not to adopt an alternative plan, proposed at the same time and supported by religious organizations,¹³⁹ that defined hardship broadly and would have effectively eliminated the city's ability to designate as a landmark property owned by any tax-exempt organization.¹⁴⁰

In 1995, under pressure to allow changes to an Armenian Apostolic Church,¹⁴¹ the city council of a Los Angeles suburb voted to exempt churches from restrictions on alterations to designated landmarks.¹⁴² In 1996, that same city adopted an ordinance that allowed churches to be removed from the historic register.¹⁴³ The ordinance is even broader than AB 133, which does not apply retroactively to churches already designated.¹⁴⁴

136. Weinstein, *supra* note 28, at 114-15.

137. *Id.* at 104-05.

138. *Id.* at 115.

139. *Id.* at 114-15.

140. *Id.*

141. Among changes to the neoclassical building proposed by the congregation were: adding an "eastern-style dome," enlarging the sanctuary, moving the altar, and adding a parking garage. Steve Ryfle, *Cultures Clash over Glendale Church Building*, L.A. TIMES, Apr. 18, 1995, at B1. Archbishop Sarkissian of Saint Mary's Armenian Apostolic Church "warned that rejecting the church's request to be freed from the ordinance could open up a rift between the Armenian community and [the] city government." This is no small threat—Glendale's Armenian population is estimated to be more than 40,000. Steve Ryfle, *Historic Churches Win Exemption: Council Votes to Remove Religious Buildings from Regulations Governing Alterations to Designated Landmarks*, L.A. TIMES, Nov. 30, 1995, at B5, available in LEXIS, News Library, Majpap File.

142. Steve Ryfle, *Historic Churches Win Exemption: Council Votes to Remove Religious Buildings from Regulations Governing Alterations to Designated Landmarks*, L.A. TIMES, Nov. 30, 1995, at B5, available in LEXIS, News Library, Majpap File.

143. Glendale, Cal., Ordinance 5110 (Mar. 5, 1996) (amending Glendale City Code §§ 15.20.055, 15.20.060).

144. AB 133 amended California Government Code sections 25373 and 37361 to read, in part, "[n]othing in this subdivision shall be construed to infringe on the authority of any legislative body to enforce special conditions and regulations on any property designated prior to January 1, 1994" CAL. GOV'T CODE §§ 25373(e), 37361(e) (Deering Supp. 1995).

G. *The Passage of AB 133*

In 1994, when the California State Legislature enacted AB 133, it was against a backdrop of dissonant opinions between state and federal courts on free exercise and the historic preservation of churches.¹⁴⁵ AB 133 amended the state code to give religious organizations an absolute veto over whether their property could be historically designated by local government,¹⁴⁶ but did not apply retroactively.¹⁴⁷ This amendment was enacted at the behest of the Catholic Diocese

145. See, e.g., *Saint Bartholomew's*, *supra* note 2; First Covenant I, 787 P.2d 1352 (Wash. 1990), *vacated and remanded*, 499 U.S. 901 (1991), *aff'd on reh'g*, First Covenant II, 840 P.2d 174 (Wash. 1992).

146. California Government Code § 37361, subdivision (b) reads, in part, that city legislative bodies may "provide for places, buildings, structures, works of art, and other objects, having a special character or special historical or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use" CAL. GOV'T CODE § 37361 (Deering Supp. 1995). California Government Code § 25373, subdivision (b) reads, in part, that county boards of supervisors are authorized to "provide special conditions or regulations for the protection, enhancement, perpetuation, or use of places, sites, buildings, structures, works of art and other objects having a special character or special historical or aesthetic interest or value." CAL. GOV'T CODE § 25373 (Deering Supp. 1995).

AB 133 amended subdivision (d) of Government Code §§ 25373 and 37361 to read, in part, that

[s]ubdivision (b) shall not apply to noncommercial property owned by any association or corporation that is religiously affiliated and not organized for private profit, whether the corporation is organized as a religious corporation, or as a public benefit corporation, provided that both of the following occur:

- (1) The association or corporation objects to the application of the subdivision to its property.
- (2) The association or corporation determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved.

CAL. GOV'T CODE §§ 25373(d), 37361(c) (Deering Supp. 1995). According to this amendment, all that a religious organization need do to exempt its property from landmark designation is object to the designation and select a reason for its objection from subdivision (d)(2) in a public, but non-governmental, forum. §§ 25373, 37361.

147. Subdivision (e) of §§ 25373 and 37361 was amended to read, in part, that "nothing in this subdivision shall be construed to infringe on the authority of any legislative body to enforce special conditions and regulations on any property designated prior to January 1, 1994, or to authorize any legislative body to override the determination made pursuant to paragraph (2) of subdivision 84(d)." §§ 25373, 37361.

of San Francisco¹⁴⁸ to "ensure the protection of religious freedom" as guaranteed by the United States and California Constitutions.¹⁴⁹ The legislation was written by San Francisco Assemblyman and Assembly Speaker Willie Brown,¹⁵⁰ now Mayor of San Francisco,¹⁵¹ after that city's Catholic diocese closed nine churches and "arous[ed] preservationists' fears that [the churches might] be sold, demolished, or remodeled."¹⁵² The legislation was supported by a number of churches and religious organizations and opposed by historic preservationists who argued, among other things, that the legislature was being "used to interfere in a San Francisco controversy."¹⁵³

H. *Relevant Establishment Clause Case Law*

The Establishment¹⁵⁴ and Free Exercise¹⁵⁵ Clauses of the First Amendment bind the states via the Fourteenth Amendment.¹⁵⁶ The conflict over AB 133 mirrors the tension between the Religion Clauses: Does AB 133 simply remove interference or discrimination against religion (in the name of free exercise), or does it endorse or support religion (as prohibited by the Establishment Clause)? Justice O'Connor summed up this conflict in a criticism of the long-standing *Lemon*¹⁵⁷ test for constitutionality under the Establishment Clause:

148. Adams, *supra* note 4, at A4.

149. See 1994 Cal. Stat. ch 1199 § 1 ("AB 133"). The Legislature provided that the Act "ensure[s] the protection of religious freedom guaranteed by Section 4 of Article I of the California Constitution, and by the First Amendment to the United States Constitution." CAL. GOV'T CODE § 37361, Note (Deering Supp. 1995).

150. John King & Clarence Johnson, *Brown's Shining Moment - New Mayor Takes Over*, S.F. CHRON., Jan. 9, 1996, at A1, A13 (describing Willie Brown, the former Assembly Speaker, as the "state's most powerful Democrat").

151. *Id.* (detailing Brown's mayoral inauguration).

152. Adams, *supra* note 4, at A4.

153. California Committee Analysis, AB 133, Assembly Floor Hearing, Aug. 30, 1994.

154. U.S. CONST., amend. I. ("Congress shall make no law respecting an establishment of religion . . .").

155. U.S. CONST., amend. I. ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

156. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994).

157. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[R]igid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights.¹⁵⁸

In another United States Supreme Court case, the decision noted that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."¹⁵⁹

There is no direct precedent to the case challenging AB 133,¹⁶⁰ nor has the judge in the case provided a basis for his grant of summary judgment.¹⁶¹ Consequently, this comment will examine the constitutionality of AB 133 in light of (1) case law linked to the Establishment Clause,¹⁶² and (2) the complicated state of free exercise jurisprudence.¹⁶³ Some of the cases used in this comment were derived from the Plaintiffs' and State's motions¹⁶⁴ in the challenge to AB 133,¹⁶⁵ others from law review articles¹⁶⁶ and a survey of the subject matter.

158. *Wallace v. Jaffree*, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring).

159. *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668-69 (1970).

160. See Plaintiffs' Joint Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Cal. Super. Ct. Apr. 5, 1996).

161. Without comment, Judge Joe S. Gray granted summary judgment to the plaintiffs on April 5, 1996. *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Cal. Super. Ct. Apr. 5, 1996).

162. See discussion *infra* Part IV.

163. See discussion *supra* Part II.E.

164. See Plaintiffs' Joint Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Cal. Super. Ct. Apr. 5, 1996); Defendant State of California's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Cal. Super. Ct. Apr. 5, 1996).

165. Plaintiffs' Joint Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Cal. Super. Ct. Apr. 5, 1996).

166. See, e.g., Weinstein, *supra* note 28; Carmella, *supra* note 34.

1. *The Federal Establishment Clause and the Lemon Test*

For a number of years, courts have applied the test elucidated in *Lemon v. Kurtzman*¹⁶⁷ in deciding whether government action violated the Establishment Clause.¹⁶⁸ In *Lemon*, the United States Supreme Court found that a Pennsylvania statute that allowed the state to pay non-public schools to provide secular educational services was unconstitutional under the Religion Clauses.¹⁶⁹ Most of the non-public schools from which the services were purchased were affiliated with the Catholic Church.¹⁷⁰ In deciding the case, the Court considered the "cumulative criteria" developed by the Court over the years.¹⁷¹ Those cumulative criteria now compose the *Lemon* test.¹⁷²

In order for a statute to be constitutional under *Lemon*, the government must show that its action (1) serves a secular purpose, (2) has a primary secular effect, and, (3) avoids excessive state entanglement with religion.¹⁷³ If the government fails to satisfy all three prongs of the *Lemon* test, its action violates the Establishment Clause.¹⁷⁴ Those currently challenging AB 133 claim that the law fails all three prongs of the *Lemon* test and thus violates the Establishment Clause.¹⁷⁵ The State of California claims that AB 133 passes all three prongs and thus passes Establishment Clause muster.¹⁷⁶

167. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

168. Weinstein, *supra* note 28, at 156. See also *supra* text accompanying notes 177-204.

169. *Lemon*, 403 U.S. at 625.

170. *Id.*

171. *Id.* at 612.

172. *Id.*

173. *Id.* at 612-13.

174. Russell W. Galloway, Jr., *Basic Establishment Clause Analysis*, 29 SANTA CLARA L. REV. 845, 847 (1989).

175. See Plaintiffs' Joint Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Cal. Super. Ct. Apr. 5, 1996).

176. See Defendant State of California's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Cal. Super. Ct. Apr. 5, 1996).

a. *The First Prong of the Lemon Test: Secular Purpose*

In this comment, two cases will be analyzed in considering the first prong of the *Lemon* test (secular purpose) in the challenge to AB 133. In *Edwards v. Aguillard*,¹⁷⁷ the Court applied the *Lemon* test to the Louisiana Creationism Act, which forbade the teaching of the theory of evolution in public schools unless the theory of "creation science" was also taught.¹⁷⁸ The Court found that although the Creationism Act's stated purpose was to protect academic freedom,¹⁷⁹ the Act was not designed to further that goal and was thus unconstitutional based on the secular purpose prong of *Lemon*.¹⁸⁰ The Court's decision was based on the Act's legislative history and analysis of the Creationism Act itself.¹⁸¹

Although the Court in *Aguillard* found no secular purpose to Louisiana's Creationism Act, the Court's usual deference to legislative intent is reflected in an earlier case, *Mueller v. Allen*.¹⁸² In *Mueller*, a case involving a Minnesota Act that allows parents to deduct public or private school expenses, including those for parochial schools, the United States Supreme Court applied the *Lemon* test and found the Act constitutional.¹⁸³ In considering the first prong of the *Lemon* test, the Court spent little time on whether the Act had a secular purpose¹⁸⁴ and noted that this cursory look reflected "at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."¹⁸⁵

b. *The Second Prong of the Lemon Test: Primary Secular Effect*

The second prong of the *Lemon* test, whether a statute has the primary effect of advancing religion,¹⁸⁶ will be viewed

177. 482 U.S. 578 (1987).

178. *Id.* at 581.

179. *Id.* at 586.

180. *Id.*

181. *Id.* at 586-89.

182. 463 U.S. 388, 394-95 (1983).

183. *Id.* at 390-94.

184. *Id.* at 394-95.

185. *Id.*

186. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

in the context of *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*,¹⁸⁷ *Larkin v. Grendel's Den, Inc.*¹⁸⁸ and *Texas Monthly, Inc. v. Bullock*.¹⁸⁹ In *Amos*, the Court applied the *Lemon* test and held that the exemption of churches from a provision of Title VII of the Civil Rights Act of 1964, protecting employees from religious discrimination, did not violate the Establishment Clause.¹⁹⁰ In considering the second prong of the *Lemon* test, the Court said, "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence."¹⁹¹

In *Texas Monthly*, a Texas statute exempted certain publications—only religious periodicals and books published or distributed by a religious faith—from sales and use taxes.¹⁹² In holding that the tax was unconstitutional, the Court found that the fact that a statute benefits religion does not necessarily deprive the statute of an "overriding secular purpose or effect,"¹⁹³ but in this case, *only* religion was benefitted and therefore the statute had the effect of advancing religion. The Court went on to note that in some cases where religion benefits from governmental action,

[B]enefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as a state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect.¹⁹⁴

In *Larkin*, a Massachusetts statute gave churches the power to prevent the issuance of a liquor license for any establishment within 500 feet.¹⁹⁵ Applying the *Lemon* test, the

187. 483 U.S. 327 (1987).

188. 459 U.S. 116 (1982).

189. 489 U.S. 1 (1989).

190. *Amos*, 483 U.S. at 329-30.

191. *Id.* at 337 (emphasis omitted).

192. *Texas Monthly*, 489 U.S. at 5.

193. *Id.* at 11.

194. *Id.*

195. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117 (1982).

Court held that the statute was unconstitutional.¹⁹⁶ Under the second prong of *Lemon*, the Court found the statute to have the effect of advancing religion,¹⁹⁷ saying that because the statute held the churches' decision-making to no standards, that power could be used for "explicitly religious goals."¹⁹⁸ In addition, the Court found that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion."¹⁹⁹

c. *The Third Prong of the Lemon Test:
Entanglement of Church and State*

The third prong of *Lemon*, whether a statute impermissibly entangles church and state, will be viewed in the context of *Larkin* and *Amos*. In *Larkin*, the Court found that the statute "conferring veto power over government licensing authority"²⁰⁰ unconstitutionally entangled church and state.²⁰¹ The Court noted that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."²⁰²

In *Amos*, the Court found that exempting religious organizations from liability for religious discrimination under Title VII did not violate the third prong of the *Lemon* test.²⁰³ The Court instead found that the statute lessened entanglement because it avoided "the kind of intrusive inquiry into religious belief that the District Court engaged in in this case."²⁰⁴

2. *Kiryas Joel: Another Federal Establishment Clause
Test Emerges*

More recently, a different test was used by the Supreme Court in evaluating an Establishment Clause case. The vil-

196. *Id.* at 123, 127.

197. *Id.* at 126.

198. *Id.* at 125.

199. *Id.* at 125-26.

200. *Larkin*, 459 U.S. at 125.

201. *Id.* at 126.

202. *Id.* at 127.

203. *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 339 (1987).

204. *Id.*

lage of Kiryas Joel is a religious enclave in New York State.²⁰⁵ In *Board of Education of Kiryas Joel Village School District v. Grumet*,²⁰⁶ a state statute created a special school district that followed exactly the boundary of the religious enclave and had the effect of providing publicly-funded special education services exclusively to that village's handicapped children.²⁰⁷

In deciding the case, the Court relied on a "constitutional command."²⁰⁸ "[P]roper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, . . . favoring neither one religion over others nor religious adherents collectively over nonadherents."²⁰⁹ Using this standard, the United States Supreme Court found that the statute violated the Establishment Clause.²¹⁰ In addition, the Court noted that a state may not "delegate its civic authority to a group chosen according to a religious criterion."²¹¹ Although there is support in the Court for replacing the *Lemon* test with the standard used in *Kiryas Joel*,²¹² it is not yet clear whether the Court has completely abandoned *Lemon*.

3. *The California Constitution's Religion Clauses*

The challenge to AB 133 must also be considered in light of the California Constitution.²¹³ In *Sands v. Morongo Unified School District*,²¹⁴ the California Supreme Court considered whether prayers at high school graduation ceremonies violated the state and federal constitutions.²¹⁵ The court found the graduation prayers violated the Federal Constitu-

205. See *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994).

206. *Id.*

207. *Id.*

208. *Id.* at 2487.

209. *Id.*

210. *Kiryas Joel*, 114 S. Ct. at 2492.

211. *Id.* at 2488.

212. *Id.* at 2500 (O'Connor, J., concurring).

213. "Free exercise and enjoyment of religion without discrimination or preference are guaranteed The legislature shall make no law respecting an establishment of religion." Cal. Const. art. I, § 4.

214. 809 P.2d 809 (Cal. 1991), *cert. denied.*, 505 U.S. 1218 (1992).

215. *Id.* at 810.

tion because they violated both the effect and entanglement prongs of the *Lemon* test.²¹⁶

The court found the graduation prayers violated the state constitution as well,²¹⁷ noting that the California Constitution provides for even greater separation of church and state than does the Federal Constitution.²¹⁸ Justice Mosk said in his *Sands* concurrence that, under the preference clause of the state constitution,²¹⁹ "[t]he relevant inquiry is whether government has granted a benefit to a religion or religion in general that is not granted to society at large. Once government bestows that differential benefit on religion, it has acted unconstitutionally in this state."²²⁰

In *Lucas Valley Homeowners Association v. County of Marin*,²²¹ the California Court of Appeals considered, in part, whether a board of supervisors' approval of an exception to a county code, which allowed the conversion of a home into a synagogue, was an unconstitutional preference or permissible accommodation.²²² The court quoted Justice Mosk's statement of the standard for violation of the state's establishment clause,²²³ but later narrowed it by defining a "zone of accommodation."²²⁴ This zone tempers the broad scope of the Preference Clause,²²⁵ "[w]e can conceive what might be viewed as accommodation under federal law would be an illegal preference in this state. In California, it appears [that] the zone of religious accommodation does not extend beyond what is necessary to avert discrimination or prevent a free exercise

216. *Id.* at 813-19.

217. *Id.* at 820-21.

218. *See id.* at 820 (noting that the establishment clause of the California Constitution is "virtually identical" to that of the Federal Constitution). The California Constitution also has two further guarantees of the separation of religion and government, in Articles I and XVI. CAL. CONST. art. I, XVI. *See also* CAL. CONST. art. I, § 4 ("free exercise and enjoyment of religion without discrimination or preference"); CAL. CONST. art. XVI, § 5 ([n]either the Legislature, nor . . . other municipal corporation, shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose . . .").

219. CAL. CONST. art. I, § 4.

220. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 840 (Cal. 1991), *cert. denied.*, 505 U.S. 1218 (1992).

221. 284 Cal. Rptr. 427 (1991).

222. *Id.*

223. *Sands*, 809 P.2d at 840.

224. *Lucas Valley*, 284 Cal. Rptr. at 436 n.8.

225. *See* CAL. CONST. art. I, § 4.

abuse.”²²⁶ In view of this, the court noted that synagogue members would not be unconstitutionally burdened if they were not allowed to locate their synagogue at a specific location because of a county code.²²⁷ This noncoercive, neutral government action simply made it more onerous for members of the synagogue to practice their religion, but did not violate free exercise.²²⁸

III. IDENTIFICATION OF THE PROBLEM

AB 133 was the California Legislature’s response to the increasing strife between churches and historic preservation and to the increased pressure from churches for protection from landmark designation. Summary judgment has been granted to the plaintiffs in a challenge to the Act, but has been appealed by the State. Thus, the question remains: Are AB 133 and local legislative acts²²⁹ granting only churches an exemption from historic preservation unconstitutional violations of the federal or state Establishment Clauses, or do they simply lift an unconstitutional free exercise burden?

This comment suggests that AB 133 and like acts are unconstitutional, and proposes guidelines for alternative legislation.²³⁰ Legislation written within these guidelines would avoid many of the constitutional questions of AB 133 and address some of the free exercise concerns of churches. The inherent tension between the Religion Clauses, however, makes it unlikely that any legislation could completely satisfy both interests.

IV. ANALYSIS

A. AB 133 and the Lemon Test

1. The First Prong: Secular Purpose

To satisfy the first prong of the *Lemon* test, a statute must have a secular purpose:²³¹ the government’s actual purpose may not be to “endorse or disapprove of religion.”²³² The stated purpose of AB 133 is to “ensure the protection of

226. *Lucas Valley*, 284 Cal. Rptr. at 436 n.8.

227. *Id.*

228. *Id.* at 436.

229. See *supra* notes 142-45 and accompanying text.

230. See discussion *infra* Parts IV., V.

231. Galloway, Jr., *supra* note 174, at 854.

232. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987).

religious freedom guaranteed" by the state and federal constitutions.²³³ This purpose is to be achieved by exempting any church-owned, non-commercial property from landmark designation.²³⁴

The secular purpose prong is usually easily met,²³⁵ with courts giving great deference to state legislatures if "a plausible secular purpose for the State's program may be discerned from the face of the statute."²³⁶ In order to show that the legislative intent of AB 133 or a like act was indeed secular, and that the purpose was "sincere and not a sham,"²³⁷ the government would have to show that the act furthered its goal of ensuring the protection of religious freedom.²³⁸ Consequently, the government would have to show that the historic preservation of churches in some way threatens religious freedom.

Although there is little consensus on whether the historic preservation of churches violates the Religion Clauses,²³⁹ there are some areas of preservation that courts agree implicate free exercise issues. For instance, the court in *Saint Bartholomew's* grounded its decision partly in the fact that the church had not proved that New York City's landmark regulations had prevented the church from carrying out its "religious and charitable mission in its current buildings."²⁴⁰ If the city's regulations had done so, the church would have prevailed on its free exercise claims²⁴¹ based on Supreme Court precedent.²⁴²

233. 1994 Cal. Stat. ch 1199 § 1 ("AB 133").

234. Subdivision (d) of Government Code § 25373 and subdivision (c) of Government Code § 37361 were amended to read, in part, that "[s]ubdivision (b) shall not apply to noncommercial property owned by any association or corporation that is religiously affiliated . . ." CAL. GOV'T CODE §§ 25373 (d), 37361 (c) (Deering Supp. 1995).

235. Galloway, Jr., *supra* note 174, at 855.

236. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

237. *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).

238. *Id.* at 587.

239. See, e.g., *Saint Bartholomew's*, *supra* note 2; First Covenant I, 787 P.2d 1352 (Wash. 1990), *vacated and remanded*, 499 U.S. 901 (1991), *aff'd on reh'g*, First Covenant II, 840 P.2d 174 (Wash. 1992) (conflicting opinions on free exercise and the historic preservation of churches).

240. *Saint Bartholomew's*, *supra* note 2, at 351.

241. *Id.*

242. *Id.*

AB 133 seems to sweep more broadly than necessary to "ensure the protection of religious freedom"²⁴³ by exempting from historic preservation not only church buildings but any non-commercial property owned by a religious organization.²⁴⁴ Under AB 133, if the *Saint Bartholomew's* situation presented itself in California, the church would be allowed to tear down the Community House (as the building is a "non-commercial" property)²⁴⁵ and build the skyscraper, even though the Community House was not essential to practicing the religion and therefore not protected from interference by free exercise. The court in *Saint Bartholomew's* specifically held that restraining the church's ability to raise revenue through the landmark designation of the Community House did not "implicate the Free Exercise Clause."²⁴⁶

Before they were amended by AB 133 to exempt churches, California Government Code sections 25373 and 37361 would have allowed the landmark designation of a church whether or not the designation unconstitutionally prevented the church from carrying out its mission. As amended by AB 133, the code would not allow landmark designation of a church or church-owned non-commercial building to prevent a religious organization from carrying out its mission, as long as the organization asked for an exemption. Therefore, despite the new statute's unnecessarily broad scope, it appears that AB 133 furthers its stated goal of ensuring religious freedom,²⁴⁷ and would thus satisfy the first prong of the *Lemon* test.

2. *The Second Prong: Primary Secular Effect*

To satisfy the second prong of the *Lemon* test, the primary effect of a statute must be secular, not that of advancing religion.²⁴⁸ According to case law,²⁴⁹ a court must decide

243. See *supra* note 149.

244. CAL. GOV'T CODE §§ 25373(d), 37361(c) (Deering Supp. 1995).

245. *Id.*

246. *Saint Bartholomew's*, *supra* note 2, at 355.

247. See 1994 Cal. Stat. ch 1199 § 1 ("AB 133"). The Legislature provided that the Act "ensure[s] the protection of religious freedom guaranteed by Section 4 of Article I of the California Constitution, and by the First Amendment to the United States Constitution." *Id.*

248. Galloway, Jr., *supra* note 174, at 855.

249. See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117 (1982); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

whether a statute's effects impermissibly advance religion²⁵⁰ or are a permissible constitutional accommodation of religion.²⁵¹

In exempting churches from the historic designation of not only buildings related to worship but all non-commercial property,²⁵² AB 133 has several effects. One effect is to relieve churches of the financial and architectural constraints of landmark designation under which other owners of historic properties, including other non-profit organizations, must function. Thus, a church could buy houses in the middle of a historic district, demolish them, erect an office building with modern amenities, and compete with surrounding property owners constrained by historic designation from remodeling or expanding. Considering that the goal of AB 133 was to ensure religious freedom, the effect of allowing churches to unfairly compete in the commercial market with similarly situated property owners does not appear to be a permissible accommodation. The church's ability to exempt itself from historic preservation and build an office building seems only very distantly related to free exercise, if at all.

"For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."²⁵³ By creating a separate, church-run process for deciding the appropriateness of their own exemptions,²⁵⁴ AB 133 gives churches

250. See, e.g., *Larkin*, 459 U.S. at 117; *Texas Monthly*, 489 U.S. 1 (1989).

251. See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987).

252. Galloway, Jr., *supra* note 174, at 845.

253. *Amos*, 483 U.S. at 337.

254. Subdivision (d) of Government Code § 25373 and subdivision (c) of Government Code § 37361 were amended to read, in part, that

[s]ubdivision (b) shall not apply to noncommercial property owned by any association or corporation that is religiously affiliated . . . provided that both of the following occur:

- (1) The association or corporation objects to the application of the subdivision to its property.
- (2) *The association or corporation determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved.*

CAL. GOV'T CODE §§ 25373 (d), 37361 (c) (Deering Supp. 1995) (emphasis added). Because "public forum" is not defined in sections 25373 or 37361 as the meeting of a legislative body, such as a city or county Landmarks Commission, the forum to which the code refers could simply be a church-run community

legislative authority over a governmental process.²⁵⁵ According to *Larkin*, this granting of authority could be interpreted as giving governmental approval to religion.²⁵⁶ The question is whether these benefits deprive AB 133 of an "overriding secular purpose or effect,"²⁵⁷ or simply allow "churches to advance religion, which is their very purpose."²⁵⁸ In the context of *Larkin*, AB 133's grant of authority to churches suggests that government has given approval to religion and, therefore, fails *Lemon* by advancing religion through the government's own activities.

In *Amos*, which has been described as a "high-water mark" of religious accommodation,²⁵⁹ the Court was not persuaded that an exemption was unconstitutional simply because it applied only to religious organizations. The Court said that where "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."²⁶⁰ The Court emphasized, however, that in order to singularly benefit religion without offending the Constitution, government must properly act to lift a regulation burdening free exercise.

AB 133 sweeps more broadly than required to lift any incidental burdens to free exercise by the historic preservation of church-owned property. For instance, as outlined above, AB 133 would allow a church to commercially develop property free of the confines of landmark designation in the midst of a historic district, clearly giving it an economic advantage over other, non-religious property owners. This effect of AB 133 arguably does not lift a burden on free exercise, for as the court held in *Saint Bartholomew's*, restraining a church's ability to raise revenue does not burden free exercise.²⁶¹ Fur-

meeting. CAL. GOV'T CODE § 54952 (Deering Supp. 1996). Importantly, this undefined public forum would be exempt from the strict open meeting requirements of the Brown Act. See CAL. GOV'T CODE § 54950 (Deering 1996).

255. California Government Code §§ 37361 and 25373 grant the power to designate landmarks to *cities* and *counties*, not to private parties. CAL. GOV'T CODE §§ 25373(b), 37361(b) (Deering 1995).

256. See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982).

257. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10-11 (1989).

258. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987).

259. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 769 (1992).

260. *Amos*, 438 U.S. at 328.

261. *Saint Bartholomew's*, *supra* note 2, at 355.

thermore, there is support on both sides of the debate over the historic preservation of church-owned property for the notion that commercial development should not be constitutionally protected.²⁶² Because AB 133 singularly benefits religion without acting to lift a burden to free exercise, it does not meet the Court's standard in *Amos*.

Soon after *Amos* was decided, the Court was less accommodating in *Texas Monthly*, instructing simply that government actions could not singularly benefit religion, period. In *Texas Monthly*, the Court held that government policies with secular objectives may incidentally benefit religion, but may not be so narrowly written as to benefit only religion.²⁶³ Discussing past decisions, the Court noted that if benefits were narrowly "confined to religious organizations, they could not [appear as] other than state . . . sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect."²⁶⁴ As the Supreme Court instructs in *Texas Monthly*, because AB 133 benefits only religious organizations, this underinclusion means the statute lacks secular effect. Therefore, according to the *Texas Monthly*, the statute fails the second prong of *Lemon*.

In addition to AB 133 providing exemptions to churches from historic preservation, it creates an extra-governmental forum in which the exemption is decided. AB 133 removes churches from the standard governmental processes of landmark designation and establishes a separate review in which churches decide whether their non-commercial property is to be designated a landmark.²⁶⁵ The statute sets out no standards on which the decision is to be based, requiring only that the determination be made in a public, but not governmental, forum.²⁶⁶ In *Larkin*, the Court held that a church's veto power over legislative authority could unconstitutionally effect the advancement of religion because it was

262. Weinstein, *supra* note 28, at 137 (noting that he and Carmella (author cited, *supra* note 34, who strongly supports blanket exemptions from historic preservation for churches), agree that "commercial development by a religious institution is undeserving of constitutional protection").

263. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989).

264. *Id.* at 11.

265. See CAL. GOV'T CODE §§ 25373(d), 37361(c) (Deering Supp. 1995).

266. *Id.*

"standardless, calling for no reasons, findings, or reasoned conclusions."²⁶⁷

Although AB 133 requires that a religious organization make one of three findings for exemption from landmark designation, like *Larkin* there are no standards for making those findings. According to the Court in *Larkin*, the lack of standards provided to churches by AB 133 could unconstitutionally effect the advancement of religion, which is impermissible under *Lemon*.

Furthermore, the Court in *Larkin* found that a statute providing for the joint exercise of legislative authority between a church and government had the primary effect of advancing religion.²⁶⁸ This sharing of authority provided a "significant symbolic benefit to religion" because of the power conferred. AB 133 bestows on churches two important aspects of the governmental process of landmark designation: both control of the public hearing on whether an exemption should be allowed and an absolute, unassailable veto. In the context of *Larkin*, AB 133 has provided religious organizations with significant symbolic benefit as well as ceding real authority. If this were found to be the primary effect of the statute, it would violate the second prong of *Lemon*.

It has been noted that the second prong of *Lemon* is the hardest prong to satisfy.²⁶⁹ In the context of a pro-accommodation decision like *Amos* and less accommodating decisions like *Larkin* and *Texas Monthly*, AB 133 would likely fail the primary effect test. The statute's narrowness of benefit and the amount of standardless power granted in governmental decisionmaking would seem to render AB 133 unconstitutional under the second prong of the *Lemon* test.

3. *The Third Prong: Excessive Entanglement*

To satisfy the third prong of the *Lemon* test, a court must find that the government action does not create excessive entanglement between state and religion.²⁷⁰ This prong implicates the involvement of religious organizations in the governmental process²⁷¹ of landmark designation under AB 133.

267. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982).

268. *Id.* at 125-26.

269. Galloway, Jr., *supra* note 174, at 855-56.

270. *Id.* at 859.

271. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987).

The Court in *Amos* characterized impermissible entanglement as the kind of intrusive inquiry into religious belief conducted by a lower court in the same case.²⁷² That inquiry was used to determine whether an activity was religious and consisted of an examination of finances, management, ritual, religious beliefs, and tenets. The Court found that exempting religious organizations from a section of the Civil Rights Act more completely separated church from state by avoiding this type of inquiry into religious belief.

The finding in *Amos* could support the provision of AB 133 that gives religious organizations a role in governmental decision-making by leaving the inquiry to the churches themselves, rather than giving a landmarks commission the power to inquire into the appropriateness of the exemption. On the other hand, in *Saint Bartholomew's*, the court found that the degree of interaction between the New York City Landmarks Commission and the church "does not rise to the level of unconstitutional entanglement" because the only matters scrutinized were architectural and financial.²⁷³

In *Larkin*, the Court found that the core rationale underlying the Establishment Clause is that of preventing "a fusion of governmental and religious functions."²⁷⁴ Key to the instant analysis is that the Court in *Larkin* objected to the statute's substitution of the "unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards" on issues described as having "significant economic and political implications."²⁷⁵ This could well describe AB 133's grant of power to churches.²⁷⁶ In giving churches unilateral and absolute veto power and their own hearing process, with none of the government requirements as to agenda, notice, standards, or public comment, AB 133 fails the third prong of the *Lemon* test under both *Amos* and *Larkin*.

272. *Id.*

273. *Saint Bartholomew's*, *supra* note 2, at 356 n.4.

274. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963)).

275. *Id.* at 127.

276. See CAL. GOV'T CODE §§ 25373(d), 37361(c) (Deering Supp. 1995).

B. *AB 133 and the Kiryas Joel Test*

AB 133 should also be examined in the context of the test recently used by the United States Supreme Court in evaluating a statute's constitutionality under the Establishment Clause. The test in *Kiryas Joel* demands government neutrality toward religion: that government not favor the religious over the non-religious.²⁷⁷ The Court in *Kiryas Joel* found a statute unconstitutional because it departed from the "course of neutrality" by delegating government's discretionary authority to a religious group.²⁷⁸ Under AB 133, California also delegated discretionary authority—that which has long rested with municipal government—to religious organizations.²⁷⁹ The Court compared *Larkin* to *Kiryas Joel*, noting that the united civic and religious authority in *Larkin*²⁸⁰ presented an even clearer violation of the Establishment Clause.²⁸¹

The Court further expounded on government neutrality towards religion, noting that the "general principle that civil power must be exercised in a manner neutral to religion . . . is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges."²⁸² Making the test even more applicable to AB 133, the Court compared *Kiryas Joel*, in which one religious sect benefitted, to cases involving benefit to religion as a whole, saying each would be unconstitutional.²⁸³

Whether *Kiryas Joel* replaces *Lemon* as the standard for Establishment Clause questions remains to be seen; the United States Supreme Court itself is unsure. In her concurrence, Justice O'Connor praised *Kiryas Joel*'s shift from *Lemon*, describing the *Lemon* test as "rigid."²⁸⁴ Justice Blackmun, however, disagreed that *Kiryas Joel* represented a

277. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, at 2484-85 (1994).

278. *Id.*

279. See CAL. GOV'T CODE §§ 25373(d), 37361(c) (Deering Supp. 1995).

280. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (giving churches an absolute veto over the granting of liquor licenses to establishments within 500 feet of a church).

281. *Kiryas Joel*, 114 S. Ct. at 2487-88.

282. *Id.* at 2491.

283. *Id.* at 2492.

284. *Id.* at 2485, 2500.

shift, saying that the holding was firmly grounded in the second and third prongs of *Lemon*.²⁸⁵ What does seem apparent is that under *Kiryas Joel*, AB 133 would not survive on two main issues: the delegation of governmental authority to religion and the statute's narrow field of benefit.²⁸⁶

C. AB 133 and the California Constitution

The California Supreme Court has found that while federal case law may help interpret the state's Establishment Clause, the scope of the clause is determined by state courts.²⁸⁷ The scope of the state's Establishment Clause has been described by the court as more protective of the separation of church and state than is the Federal Constitution.²⁸⁸ As Justice Mosk stated in his concurrence in *Sands*, under the Preference Clause of the state constitution, "[t]he relevant inquiry is whether government has granted a benefit to a religion or religion in general that is not granted to society at large. Once government bestows that differential benefit on religion, it has acted unconstitutionally in this state."²⁸⁹

AB 133 would seem to violate the Preference Clause of the state constitution, as expounded by Justice Mosk in *Sands*,²⁹⁰ by giving religious organizations an absolute veto over the historic preservation of their non-commercial property. This veto and the excuse from the burdens of landmark designation grant a benefit to religion not given to the rest of society.

285. *Id.* at 2494-95.

286. Subdivision (d) of Government Code § 25373 and subdivision (c) of Government Code § 37361 were amended to read, in part, that

[s]ubdivision (b) shall not apply to noncommercial property owned by any association or corporation that is religiously affiliated . . . provided that both of the following occur:

- (1) The association or corporation objects to the application of the subdivision to its property.
- (2) The association or corporation determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved.

CAL. GOV'T CODE §§ 25373(d), 37361(c) (Deering Supp. 1995) (emphasis added).

287. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 820 (Cal. 1991), cert. denied, 505 U.S. 1218 (1992).

288. *Id.*

289. *Id.* at 840.

290. *Id.*

Lucas Valley narrows Justice Mosk's statement of California's Establishment Clause standard by creating exceptions to the Preference Clause in its "zone of religious accommodation."²⁹¹ AB 133's exemption of religious organizations from landmark designation is not an unconstitutional preference - it falls within *Lucas Valley's* "zone" - if the exemption prevents an unconstitutional burden on free exercise. But, if the pre-AB 133 statute were seen only as a noncoercive, neutral government action that did not constitute a free exercise abuse,²⁹² AB 133 would create an unconstitutional preference, according to the state constitution.

AB 133 does exempt churches from some effects of historic preservation that could be construed as violating the Free Exercise Clause, such as controls over exterior architectural elements that may reflect religious beliefs and symbols. But AB 133 also broadly exempts religious organizations from noncoercive, neutral government actions that do not implicate free exercise. For example, an exemption allowing a church to replace a historic, non-commercial building with a modern, commercial building in a historic district does not implicate free exercise and therefore falls outside *Lucas Valley's* zone of accommodation.²⁹³ According to *Lucas Valley*, AB 133's exemptions are an impermissible accommodation under California's Preference Clause.

V. PROPOSAL

AB 133's exemption of church property from historic preservation is not linked to the lifting of burdens on free exercise. Instead, the Act gives religious organizations carte blanche to exempt any non-commercial building from historic preservation by simply determining, in their own extra-governmental process and without any findings required as a basis for the determination, that they would "suffer substantial hardship"²⁹⁴ were the building designated a landmark. To

291. *Lucas Valley Homeowners Ass'n v. County of Marin*, 284 Cal. Rptr. 427, 436 n.8 (1991).

292. *Id.* at 436.

293. *Id.* at 436 n.8.

294. AB 133 amended subdivision (d) of Government Code § 25373 and subdivision (c) of Government Code § 37361 to read, in part, that

[s]ubdivision (b) shall not apply to noncommercial property owned by any association or corporation that is religiously affiliated and not organized for private profit, whether the corporation is organized as a

survive constitutional inspection, legislation providing for exemptions from landmark designation for religious organizations must provide standards for exemption that respond to concomitant burdens on free exercise, and the decision to exempt must be made as part of a governmental process. Only on this basis could such narrowly-drawn legislation, exempting only religious organizations, survive the Supreme Court's standards in *Lemon*²⁹⁵ or *Kiryas Joel*.²⁹⁶

Local government in California is currently under great pressure to exempt church property from historic preservation.²⁹⁷ In the face of a growing hodgepodge of exemptions based on shaky or non-existent constitutional grounds²⁹⁸ the state should adopt uniform guidelines for the exemption of churches from historic preservation by local government. Unlike AB 133, however, the legislation should be firmly grounded in the constitutional tension between the Religion

religious corporation, or as a public benefit corporation, provided that both of the following occur:

- (1) The association or corporation objects to the application of the subdivision to its property.
- (2) The association or corporation determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved.

CAL. GOV'T CODE §§ 25373(d), 37361(c) (Deering Supp. 1995) (emphasis added).

295. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See also *supra* text accompanying notes 227-72.

296. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 at 2484-85 (1994). See *supra* text accompanying notes 273-82.

297. See *supra* text accompanying notes 142-45. The Glendale City Council, under intense pressure by the congregation of an Armenian Apostolic Church, has adopted an ordinance that removes churches from landmark designation. *Id.*

In Los Angeles, the city council recently voted to "strip [a Catholic cathedral] of its historic preservation status . . . to speed [its] demolition" and allow the building of a multi-million dollar cathedral complex. Kramer, *supra* note 14, at A1, A6. Cardinal Mahony, leader of the local archdiocese, has threatened to "take the church's business elsewhere within the roughly 4 million-member, three-county archdiocese" if the city blocks the demolition. *Id.*

298. One of the Los Angeles City Council members who voted to strip the cathedral of historic status does not appear to have had the Constitution in mind when he voted. Wilgoren, *supra* note 69, at B3. Council member Nate Holden was quoted as saying, "I'm going to vote with the Cardinal When I leave this world, I don't want anything in my way. I don't know how you guys feel, but I might need a little help. Let the word go forth that I'm on the right side." *Id.*

Clauses; the law should balance free exercise burdens with Establishment Clause concerns—advancement with accommodation. In addition, any decision regarding exemptions from historic preservation—a legitimate public goal—should be made within the confines of a government process, with exemptions based on meaningful findings and standards.

Because free exercise and establishment are fluid concepts, with little agreement over their meaning and ever-changing tests in the courts, the legislature cannot codify absolute standards to guide local government. However, the California legislature could provide guidance and take steps toward ensuring that the exemption of California churches from historic preservation be achieved within a constitutional framework, within that “zone of religious accommodation” necessary to avoid discrimination or free exercise abuse²⁹⁹ but also respectful of the Establishment Clause. To that end, the legislature should: (1) remove AB 133’s unconstitutional amendments to the California Government Code,³⁰⁰ (2) prohibit blanket exemptions for religious organizations because they violate the state and federal Establishment Clauses; (3) require that local government specifically anchor exemptions in response to the free exercise burdens of historic preservation; and, (4) allow exemptions to be granted only for “sacred” buildings in which religious services take place.³⁰¹ This statutory framework would be fine-tuned by the courts, based on current Free Exercise and Establishment Clause standards.

VI. CONCLUSION

Although AB 133 may have been successfully challenged, because summary judgment was granted without comment and is being appealed, the decision in *East Bay v. California* provides little guidance to those battling over the historic

299. *Lucas Valley Homeowners Ass’n v. County of Marin*, 284 Cal. Rptr. 427, 436 n.8 (1991).

300. See AB 133 amendments to CAL. GOV’T CODE §§ 25373, 37361 (Deering Supp. 1995). See also *supra* note 144.

301. These “sacred” buildings, which require the greatest degree of protection from burdens on free exercise, have been differentiated from buildings in which other more secular church activities take place by some involved in the dispute over the historic preservation of churches. See, e.g., Weinstein, *supra* note 28.

preservation of property owned by religious organizations.³⁰² In the meantime, the constitutionality of the historic preservation of church property continues to be fiercely debated, and church property continues to be exempted from historic preservation by local legislative acts.³⁰³

Based on the *Lemon* test,³⁰⁴ AB 133, which exempts all noncommercial church property and establishes a church-run, extragovernmental process controlling historic designation, appears to be an unconstitutional violation of the state and federal Establishment Clauses. Although the Act would probably pass the easiest, first prong of *Lemon*, it would likely fail the other two. AB 133 fails the second prong because the primary effect of the broad scope and standardless decisionmaking of AB 133 is not secular—it does not serve to remove an unconstitutional burden from churches but rather to advance religion.³⁰⁵ And AB 133 fails *Lemon*'s third prong, the entanglement of state and religion, because it takes the power to designate a landmark from municipalities and gives churches an absolute veto over a governmental function in an extragovernmental, church-run process.³⁰⁶ Furthermore, AB 133 does not meet the emerging test of neutrality for government action in *Kiryas Joel*³⁰⁷ because it improperly favors the religious over the non-religious—churches over other owners of historically significant property.

This comment has examined the exemption of church property from historic preservation in California. Case law, local legislative acts, and ongoing controversy demand that the state legislature replace AB 133 with a uniform scheme, including constitutionally-mandated exemptions, for the historic preservation of churches. A better balance between free exercise protections and the preservation of our historical and cultural foundations must be sought; respect for free ex-

302. Judge Joe S. Gray granted summary judgment to the plaintiffs on April 5, 1996. *East Bay Asian Local Dev. Corp. v. California*, No. 95AS02560 (Super. Ct. Cal. Apr. 5, 1996), *appeal docketed*, No. C024192 (3rd Cal. Ct. App. July 8, 1996).

303. See *supra* text accompanying notes 133-45.

304. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

305. See *supra* text accompanying notes 244-65.

306. See *supra* text accompanying notes 266-72.

307. *Kiryas Joel*, 114 S. Ct. at 2484-85, 2487 (1994).

ercise is a constitutional mandate, but the future needs the past.

*Madeleine Randal**

* The author would like to thank Liz Randal and Ron Eddow for their contributions to this comment.

